United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1488

To be argued by
RICHARD D. WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1488

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT ERCOLI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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FOR THE SECOND CIRCUIT

Docket No. 76-1488

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT ERCOLI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert Ercoli appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 6, 1976, following a five day trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment 75 Cr. 1040 filed on October 31, 1975, charged Ercoli and co-defendant Gerard Holley with conspiracy to defraud the United States and to violate the federal income tax laws, in violation of Title 18, United States Code, Section 371. Ercoli was also charged in three counts with having made false material declarations before a grand jury, in violation of Title 18, United States Code Section 1623. Co-defendant Ralph Purdy was charged in two counts and Holley in one count with having made false material declarations before a grand jury, in violation of Title 18, United States Code, Section 1623.

The trial of Ercoli and Purdy began on June 21, 1976.* On June 25, 1976 Ercoli was found guilty on all three counts submitted to the jury.** A mistrial was declared with respect to Purdy on June 28, 1976 when the jury reported that it was unable to reach a unanimous verdict.***

On October 6, 1976, Ercoli was provisionally sentenced under Title 18, United States Code § 4205(d) to concurrent five year terms of imprisonment on each of the three counts, and ordered to submit to a psychiatric study, the results of which are to be furnished to the Court within three months unless that time is extended by the Court. After the study, the defendant is to be returned to the Court for modification of his sentence pursuant to Title 18, United States Code, Section 4205(c).

Statement of Facts

The Government's Case

A. Synopsis

Over a period of several years most of the police officers for the town of Greenburgh supplemented their income by securing off duty employment. This off duty employment became an organized program operated through the Police Association of the Town of Green-

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* Defendant Holley had pleaded guilty to a superseding Indictment charging him with making a false and fraudulent income tax return, in violation of Title 26, United States Code, Section 7206(1). The Government filed a *nolle prosequi* as to Holley on Indictment 75 Cr. 1040.

** Count Four was dismissed after the Government had rested.

*** After a retrial, Purdy was acquitted.

burgh Police Department ("PBA") and the traffic division of the police department. The membership of the "PBA", which included almost every policeman in Greenburgh, determined the rate of pay to be charged employers who wanted to employ police for parttime work.

To provide an incentive for off-duty employers to hire Greenburgh police officers, and to increase the effective income of the policemen, the "PBA" voted to charge one rate of pay if the law enforcement officers would have to pay taxes on the income they earned, and another, lower rate of pay if the police officers could avoid their legal obligation to report all of their income and pay their lawful share of taxes. The police charged a tax-free rate of pay, and a taxable rate of pay.

The off-duty employment program was administered on a daily basis by the traffic division of the police department. Beginning in late 1970, the officer in charge of the traffic division and responsible for the day to day operation of this organized moonlighting program was the defendant Robert Ercoli. Indeed, in January, 1972, the PBA voted to provide Ercoli with additional compensation for operating the off-duty duty employment program. Ercoli was to receive twenty-five cents for each hour an individual policeman worked on an off-duty job.

From 1969 through 1972, the policemen secured three substantial moonlighting jobs in which not one police officer reported the income from these jobs on his income tax returns. One of these jobs, working off-duty as security guards for the New York Telephone Company, was secured for the police officers and administered by Ercoli. In 1971 and 1972, approximately fifty-eight policemen earned about $44,245.59 working for the telephone company. Not one policeman reported that in-

come on his income tax returns, and statments of earnings were not issued by the employer.

In 1969, approximately sixty-one Greenburgh police officers had earned about $61,107.50 moonlighting with Technicon Instruments Corporation. Statements of earnings were not issued, and not one policeman reported that income on his income tax return.

In 1970, 1971, and 1972, approximately twenty-eight policemen were employed by Supermarkets General Corporation "Pathmark". None of the police officers reported this income on his income tax return, and statements of earnings were not issued.*

B. The Proof at Trial

1. The Police Association determines the "tax free" rate of pay for off-duty employees

The Town of Greenburgh PBA determined at various meetings the rate to charge off-duty employers. Documentary evidence conclusively demonstrated that these law enforcement officers contemplated that they need not report income from certain jobs. The minutes of the PBA meeting for October 14, 1968 states that a motion was made to "increase our off-duty rate to $5.00 per hour (tax free)." (Tr. 328; GX 3; App. 136).**

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* In 1972, Supermarkets General Corporation also compensated nine policemen by check and issued statements of earnings for this income. Eight of these nine policemen reported that income on their income tax returns. Other policemen were paid in cash and that income was not reported.

** References to the trial transcript and to government exhibits are abbreviated as "Tr." and "GX" respectively. References to Ercoli's appendix are abbreviated as "App."

2. Sixty-one police officers work off-duty for Technician Instruments and not one reports this income

In 1969, sixty-one police officers were employed with Technicon Instruments Incorporated as off-duty security guards. These sixty-one police officers earned approximately $61,107.50 from Technicon in 1969, and none of them received a W-2 form or statement of earnings in connection with this employment.* Not one of these police officers reported on his federal income tax return any of the income earned from Technicon.

However, those police officers who "moonlighted" at other jobs where W-2 forms or income statements were issued reported that income on their income tax returns. (Tr. 324-324; GX 20; App. 143).**

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* Ercoli testified at trial that he believed that Technicon itself was taking care of his and his colleagues full share of the taxes owed to the government. (Tr. 497). He believed this despite his knowledge that this country has a graduated income tax system in which the amount of tax one pays depends on the total income earned in a year, and is not based on income earned from a particular job. (Tr. 551). Thus, it would be impossible for an off-duty employer who does not know an employee's total income from all sources to withhold the proper amount of tax owed to the Government.

** The Government proved the total number of police who worked at Technicon, the income they earned, and the failure to report that income through a review of the police officers' income tax returns (GX 1A through ICM), the records of the corporation, and a stipulation. (Tr. 324-26). In addition, a number of police officers testified that they had worked off-duty at Technicon and had failed to report that income on their income tax returns. (Tr. 28, 72, 80-81, 127-28, 157-58, 243, 261, 275, 455, 470-71; App. 26, 39-40, 121).

3. Ercoli becomes head of the traffic division and administers the off-duty employment program

Ercoli became head of the traffic division in December, 1970, and it was the traffic division that supervised the off duty employment program. (Tr. 498). Police officers would regularly sign up for off-duty jobs at the traffic division, and the police would receive their off-duty pay at the traffic division. (Tr. 32, 74, 81, 83, 130, 247, 263-64, 275-77; App. 40, 42).

4. Ercoli secures off-duty employment at the telephone company

Shortly after a strike began in 1971 at the New York Telephone Company, incidents occurred requiring the help of Greenburgh police. After one of these incidents, Ercoli met with Thomas Owens, general manager of the telephone company in Westchester, New York, at telephone company headquarters. Ercoli told Owens that the police simply could not provide any increased protection for telephone company personnel and property while the strike lasted, because the department did not have sufficient personnel. Ercoli, however, suggested that the company hire police officers who would be willing to work as security guards during their off-hours. Owens accepted this suggestion. (Tr. 197-98).

At that same meeting or at a subsequent meeting, Ercoli and Owens agreed on the amount of money the police would be paid for the after-hours work. (Tr. 199). They further agreed that an officer of the police department would submit to the telephone company a list of the hours the police worked each week, and the telephone

company would prepare payment vouchers based on these lists. (Tr. 199-200).

Immediately following Ercoli's procurement of the off-duty job with the telephone company, Ercoli spoke to a friend on the police force, Richard Maier. (Tr. 253). Ercoli asked Maier if he wanted to "moonlight" at the telephone company. (Tr. 245-46). Maier was certain that Ercoli told him he would receive $5 per hour *tax free* for the off-duty employment. (Tr. 245-46, 259).

5. Ercoli supervises the telephone company employment program and receives an "administrative fee"

The off-duty employment at the telephone company was operated by the three-man traffic division headed by Ercoli. A police officer would go to the traffic division in order to sign-up for the hours he wished to work for the telephone company.

Ercoli would then regularly appear at the telephone company headquarters to submit the list of hours each police officer worked in a given week and to pick up the cash payments for the policemen. (Tr. 200, 231-32).

The policemen would then visit the traffic division to obtain their weekly cash payments for the work they performed for the telephone company. Frequently the police received their cash payments directly from Ercoli. (Tr. 32, 74, 82-83, 130, 247, 263-64, 276-77; App. 41-42.)

During the telephone company strike Ercoli was authorized by PBA members to receive an administrative fee for operating the off-duty job program. Ercoli was to receive twenty-five cents per hour, for each hour a police-

man "moonlighted".* (Tr. 238; GX 3; App. 139). The purpose of paying a police officer a fee for operating the off-duty employment program was to insure that these valuable jobs were dispensed fairly and that the program was operated efficiently. (Tr. 74-76, 131-33, 164-65).

6. *Fifty-eight* police officers worked off-duty at the telephone company and none of them report their income

Approximately fifty-eight Greenburgh policemen were paid a total of about $44,000 for the off-duty work at the telephone company in 1971 and 1972; not one of them reported any of this income on his income tax return, and the telephone company did not maintain the appropriate records for the Internal Revenue Service. (Tr. 324-26; GX 20; App. 143).**

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* The PBA members voted the administrative fee to Ercoli at the same time they decided to increase the hourly rate to $5.50 tax-free, $6.25 with tax. (GX 3; App. 139). While the police did not assent to Ercoli's receiving this administrative fee until January 12, 1972, Ercoli had received money in the past for operating an off-duty job. In 1971, he received $.25 per hour for each hour a policeman worked off-duty for Whitmeyer, Incorporated. The money, however, was paid directly to Ecoli by the company and not by the individual policeman. (Tr. 453, 562-64; App. 120).

** As with the Technicon job, the Government proved the failure of the police to report the income earned from the telephone company through income tax records, corporate records, and a stipulation. (Tr. 324-26). In addition, a number of police officers testified that each had worked for the telephone company in 1971; that each had not received a W-2 form or statement of earnings; and that each had failed to declare this income on his income tax return. (Tr. 32-33, 73-74, 134, 247, 264, 276-77, 455-56; App. 30).

7. Ercoli proposes a new hourly rate for "tax-free" employment

At a PBA meeting in Jauary, 1972, the police officers implemented a new hourly rate which they would uniformally charge off-duty employers. The minutes of January 12, 1972 reveal that Ercoli proposed the increase and requested a continuation of the differential wage for tax-free and taxable income:

> "Bro. Ercoli stated that a new side job was coming and if the membership wanted to raise hourly rate. New hourly rate as follows: $5.50 tax free; $6.25 taxed and $20.00 minimum. Motion by Bro. W. Bell, seconded by Bro. Boyle that Bro. Ercoli receive $.25 per hour for administration of side job, all in favor, so ordered." (Tr. 327; GX 3, App. 200);

8. Off-duty work at Pathmark begins and again the income is not reported

In May, 1972, defendant Holley told the PBA members at a meeting that an off-duty job was available at Pathmark. (Tr. 328; GX 3; App. 141). There was discussion as to the differential rate of pay that would be received from Pathmark depending whether the job was to be "on the books or off the books." (Tr. 278).

During 1972, twenty-three policemen worked off-duty at Pathmark, did not receive W-2 forms, and were paid a total of $10,762.50. None of this income was reported on the individuals' income tax return. However, nine police officers, who worked at Pathmark and were paid by check, were issued statements of earnings, and eight of these nine reported that income on their income tax returns. (Tr. 324-26; GX 20; App. 143).

9. The general pattern and the contemporaneous discussions of the officers involved.

During the years 1969 through 1972, the police officers earned in excess of $100,000.00 from three off-duty jobs. This income was not reported on the income tax returns of the police officers. During that same period of time, numerous Greenburgh policemen worked for fifty-one other companies where income statements and W-2 forms were issued. That income was reported by the policemen. (Tr. 324-26; GX 20; App. 143).*

The police officers discussed among themselves the fact that certain jobs were off the books and that they could "get away" without reporting that income on their income tax returns. At certain meetings, the police discussed the fact that two pay scales existed, one on the books and one off the books, and that the money "is better in my pocket than Uncle Sam's." (Tr. 36, 75, 139-42, 163, 248-49, 277-78; App. 37, 78-80, 100-01).**

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* Thus, as revealed by the minutes of the January 12, 1972, meeting, and this general course of conduct, when the PBA membership thought they could fail to report income and violate the law with impunity, they did so. When the members felt this could not be done successfully because the companies had issued earnings statements, then they decided to obey the law and report their income from an off-duty job.

** Ercoli insisted that he never discussed the tax free status of certain jobs (Tr. 550, 570-74) despite the following demonstrable facts: (1) Almost three quarters of a one hundred man police force did some off-duty work for Technicon and none reported that income on his tax return; (2) Ercoli administered the telephone company job in which fifty-eight policemen worked, were paid in cash, and not a single officer reported that income; (3) Ercoli on many occasions distributed the cash payments to his fellow officers; and (4) Ercoli was present when the two rates of pay were approved at the January 12, 1972 PBA meeting. Certain witnesses recalled that Ercoli made the motion to in-

[Footnote continued on following page]

10. Government investigation commences into failure of Greenburgh police to report all income earned

In July, 1973, the Internal Revenue Service began a tax evasion investigation involving police officers in the town of Greenburgh. (Tr. 310). During 1975, a special grand jury was impaneled in the Southern District of New York to investigate the failure of police officers to report off-duty income and of employers to issue the appropriate statements of earnings for these policemen.

On August 11, 1975, Ercoli testified before the grand jury under oath. When he testified, the grand jury was attempting to determine whether a conspiracy existed among the policemen or between the police and the employers not to report income earned on off-duty jobs. (Tr. 318-19; App. 113-14).

Ercoli testified, *inter alia*, that the administrative fee was approved in March, 1971 and not in January, 1972. In addition he testified that officials from the New York Telephone Company approached him at the police headquarters concerning the hiring of off-duty policemen as security guards.

The Defense Case

Ercoli took the stand in his own defense. He denied at trial that he participated in a conspiracy to defraud the United States and claimed that he testified before the grand jury to the best of his knowledge and ability.

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crease the rate of pay (Tr. 75, 86); and the minutes of that meeting unambiguously state that "Bro. Ercoli stated that a new side job was coming and if the membership wanted to raise the hourly rate. New hourly rate as follows: $5.50; tax free; $6.25 taxed . . ." (Tr. 329; GX 3; App. 139).

(Tr. 543-44; App. 132-33). He asserted that he had never discussed with another officer the fact that certain employment was tax free or that he or any officer would not report income on his income tax return. (Tr. 544, 550, 573-74).

He contended that in response to complaints by William Halstead, the Chief of Police, that town money should not be used to administer the moonlighting program, the PBA authorized Ercoil to receive the $.25 administrative fee in March, 1971. Ercoli tried to establish this through his own testimony and that of Halstead and another officer, Joseph Gorey. (Tr. 441-44, 475-76, 505-15; App. 117-18, 122, 125-26). Ercoli also testified that to the best of his recollection the meeting with the telephone company representatives concerning the hiring of off-duty policemen occurred at police headquarters, but it may have occurred at the telephone company headquarters. (Tr. 523-24; App. 128-29).

The defendant elicited testimony from seven character witnesses as to his reputation in the community for truth and honesty. (Tr. 125, 298, 424, 426, 428, 430-31).

ARGUMENT

POINT I

The Evidence Was More Than Sufficient to Establish The Defendant's Guilt.

Ercoli contends that the evidence was insufficient to support the jury's guilty verdicts on Counts One, Two and Three. More specifically, he claims that, with respect to Count One, the evidence was insufficient to establish a criminal conspiracy and that, with respect to Counts Two and Three the Government failed to prove the re-

quisite intent wilfully to make false material declarations before a grand jury. These claims attacking the jury's verdict ignore both relevant precedent and the trial record.

Ercoli utterly disregards the well-settled principle that after a jury has returned a guilty verdict, an appellate court must view the evidence in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Goldberg*, 527 F.2d 165, 168 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (May 18, 1976); *United States* v. *Leonard*, 524 F.2d 1076, 1081 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). The majority of his argument consists of nothing more than inferences and conclusions he vigorously, but unsuccessfully, argued to the jury below. Ercoli, in short, seeks to have this Court disregard its recent admonition that "we may not substitute our own view of the evidence for that of the jury." *United States* v. *Sears*, Dkt. No. 76-1154, slip op. 257, 259 (2d Cir., Oct. 26, 1976). See also *United States* v. *Simon*, 425 F.2d 796, 799 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

A. The Evidence That a Conspiracy Existed Was Overwhelming

The conspiracy charged in the indictment and submitted to the jury was that the defendants and their co-conspirators "would and did agree to defraud the United States and the Internal Revenue Service, United States Treasury Department of its lawful function of determining the taxable income earned by Police who held off-duty jobs and collecting taxes, including taxes lawfully to be withheld from salaries paid to Police who held off-duty jobs, by denying to the Internal Revenue Service truthful and accurate information pertaining to the personal income of Police who held off-duty jobs." (App. 5).

Named in the bill of particulars as co-conspirators were the New York Telephone Company, Technicon Instruments Corporation, and Supermarket General Corporation Pathmark, as well as each police officer who worked off duty for one of these companies and failed to report that income on his income tax return. (App. 21). The conspiracy charged in the indictment and submitted to the petit jury was that the police would secure and work at certain off-duty jobs for which the Internal Revenue Service would be deprived of truthful and accurate information pertaining to their earned income.

The evidence that such a conspiracy existed was substantial. Indeed, this was one of those rare cases in which the co-conspirators memorialized in unimpeachable form the existence of the conspiracy. The police association minutes of October 14, 1968 state that a law enforcement officer "made [a] motion that we increase our off-duty rate to $5.00 per hour (tax free)." (GX 3; App. 136). Likewise the minutes of January 12, 1972 state in unambiguous terms the following:

> "Bro Ercoli stated that a new side job was coming and if the membership wanted to raise hourly rate. New hourly rate as follows: $5.50; tax free, $6.25 taxed and $20.00 minimum. Motion by Bro. W. Bell, seconded by Bro. Boyle that Bro. Ercoli receive $.25 per hour for administration of side job. All in favor, so ordered." (GX 3; App. 139).

Not only does Ercoli's brief ignore this devastating evidence, but it also conveniently overlooks the trial testimony. Thomas Owens, a telephone company official, testified that, following a violent incident at the telephone company headquarters, he arranged, through Ercoli, to hire Greenburgh policemen to moonlight as security guards. (Tr. 195-99). Richard Maier, a police officer, testified that shortly after a disturbance at the telephone company headquarters, he spoke with Ercoli,

and Ercoli asked him if he wanted to m nlight for the telephone company. Maier was certain that Ercoli told him the pay would be $5 "tax free." (Tr. 245-46, 259). Other police officers testified to conversations and meetings with their fellow officers, sometimes including the defendant, in which they discussed that certain off-duty jobs were tax free and that they could avoid paying taxes on the income from these jobs. (Tr. 36, 75, 139-46, 163, 249, 277-78; App. 37, 78-80, 101).*

Finally, the Government offered evidence demonstrating the existence of a pattern of conduct which was only explainable in terms of a conspiracy: In 1969, sixty-one Greenburgh policemen earned $61,107.50 moonlighting at Technicon. In 1971 and 1972, fifty-eight officers earned $44,245.59 working for the telephone company. In 1970, 1971, and 1972, twenty-eight officers were employed off-duty at Pathmark and earned approximately $16,000. Not one of these police officers reported any of this income on their income tax returns. (Tr. 324-26; GX 20, App. 143).

The infirmities in Ercoli's legal position in attacking his conviction for conspiracy are best evidenced by the fact that he devotes just three pages of his brief to this point, cites but one inapposite case, and uses one of the three pages not to analyze the legal issues but to explain

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* Without, detailing the testimony of each police officer on this subject, a few examples should suffice: One officer testified to a conversation among policemen in which one person said that the money was "better in my pocket than in Uncle Sam's pocket." (Tr. 142-44). Another officer testified about discussions concerning whether a job was on the books or off the books—"whether you paid taxes or not on it." (Tr. 36). Another recalled Ercoli stating there was a side job with a $5 hourly rate if off the books, and $6 hourly rate "if on the books, paying taxes." (Tr. 75).

that the defendant's indictment was the result of a vendetta by an opposing faction of other policemen. To the extent Ercoli is now raising a claim of selective prosecution, that claim has surely been waived since he never saw fit to raise it in the District Court. Moreover, this claim is patently frivolous; for it is clear that the decision to prosecute Ercoli was not motivated by racial or religious considerations or as a means of harassing him because of an exercise of his constitutional rights. See *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *United States* v. *Peskin*, 527 F.2d 71, 86 (7th Cir. 1975); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Ercoli was prosecuted because his role in brazenly administering and procuring tax free off-duty jobs made him more culpable than his colleagues and because he perjured himself under oath when questioned about his role.

B. The Evidence of Defendant's Guilt on Counts Two and Three Was Substantial.

By arguing that the evidence was insufficient to support the false declarations convictions on Counts Two and Three, Ercoli seems to advocate the position that on appeal the Court must credit the defendant's witnesses. To accept defendant's arguments would require this Court to reject the long-standing principle that issues of credibility are for a properly instructed jury to determine.* See, *e.g.*, *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 82 (1974); *United States* v. *Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972).

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* Ercoli does not contest the propriety or adequacy of Judge Brieant's charge in any respect.

1. Count Two

The testimony forming the basis of Count Two related to Ercoli's insistence that the PBA membership voted in March 1971 to allow him to receive $.25 per hour for each hour a policeman moonlighted. The Government proved the falsity of this testimony through the PBA minute book (GX 3; App. 137-39), and the testimony of several witnesses. Police officers William Bell and John Boyle testified that one of them made a motion at the January 12, 1972 meeting, while the other seconded it. The motion was to provide Ercoli with the $.25 per hour administrative fee. (Tr. 85-86, 161-62). Other police officers testified that they were present at the January 12, 1972 police association meeting when the proposal to pay Ercoli the administrative fee was introduced and favorably voted upon by the members. (Tr. 35, 75, 264-65).

The jury which heard the testimony of the Government witnesses had every right to conclude that Ercoli's version of events was false. The jurors were also amply justified in considering the additional fact that, except for the minutes for January 12, 1972, the minute book contained no other mention of the defendant receiving a fee for operating the off-duty employment program. While the March 10, 1971 minutes refer to Ercoli's informing the members about a new job, there is no reference to an administrative fee. A reasonable mind was almost compelled to reject Ercoli's version of the facts in view of the failure of any other minutes of any meeting to refer to a subject as significant to an individual policeman as someone taking from his off-duty pay 25 cents for each hour that he worked.*

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* Additional circumstantial evidence established the falsity of defendant's testimony in Count Two. He claimed that the

[Footnote continued on following page]

Ercoli's claim that his perjury was unwilfill is similarly unconvincing. At trial the defendant never deviated from his unequivocal grand jury testimony that the administrative fee had been approved in March 1971 and not in January 1972, as the Government claimed. He did not argue that he may have been mistaken; rather he called witnesses in an effort to establish that the fee had been authorized in March 1971. It is therefore surprising that Ercoli now argues that his perjury was not wilfill, since his defense at trial on Count Two revolved around the issue of truth or falsity. In any event, the jury was properly instructed on the issue of wilfullness, and its verdict, coupled with the overwhelming evidence, fully disposes of thi laim.

2. Count Three

Ercoli's argument on the sufficiency of the evidence on Count Three also ignores the relevant testimony. Ercoli insisted before the grand jury that telephone company personnel sought him out at police headquarters and that, at a meeting which occurred in police headquarters, the police were hired as security guards. At trial Thomas Owens, the general manager of the telephone company in Westchester, New York, testified that following a violent incident during a strike of the telephone company, Owens met Ercoli, and Ercoli suggested the possibility of the telephone company hiring police as

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administrative fee was approved in connection with the off-duty job at Whitmeyer, Inc., in March 1971. At trial he conceded that he was paid an administrative fee for operating the Whitmeyer job, but that the fee was paid directly to him and did not come from the policeman's pay. Consequently, there was no need for the police association to authorize the administrative fee, since the fee was being paid by the employer, not the police. (Tr. 453, 562-64; App. 120).

off-duty security guards. The telephone company accepted this suggestion. (Tr. 195-98). Owens was certain that he arranged for the hiring of the police at the telephone company headquarters, and not at the police headquarters. (Tr. 198). The jury had the right to credit Owens' testimony and reject the defendant's.*

POINT II

The Defendant's False Testimony Was Material To The Grand Jury Investigation.

Ercol further contends that the statements forming the bases for Counts Two and Three of the Indictment were not material to the grand jury investigation. In a post-trial opinion, Judge Brieant agreed with the Government that this claim lacked merit. (App. 147-51).

Ercoli further contends that the statements forming been impaneled to investigate allegations that police officers in Greenburgh, New York participated in an organized moonlighting program in which tax-free jobs were secured. The forelady of the grand jury testified that the grand jurors were attempting to determine whether or not there had been a conspiracy not to report income from off-duty employment among the police officers or

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* The jury also heard Richard Maier testify that he and Ercoli were at the telephone company headquarters in connection with an incident caused by the striking employees. Later that day, Maier spoke to Ercoli who asked Maier if he wanted to work an off-duty job with the telephone company and told him the pay would be $5 tax free. (Tr. 243-46). Part of the grand jury testimony of William Halstead, Chief of Police, was also received as evidence. In that testimony, Halstead stated that at the beginning of the telephone company strike he sent Ercoli to the company to talk to them about the placement of traffic signs and "side jobs." (Tr. 487-88).

among the police officers and the companies employing them. (Tr. 317-18).

The questions asked of Ercoli and Ercoli's responses which led to the charges contained in Count Two involved an inquiry concerning when the PBA first authorized Ercoli's receipt of an administrative fee for operating the moonlighting program. Ercoli testified that the fee was first authorized in March 1971, and not, as the Government later proved, in January 1972. The charges contained in Count Three concern where Ercoli met with telephone company officials in order to secure off-duty employment for the police. Ercoli testified that the telephone personnel met at his office in police headquarters, whereas the Government proved that Ercoli went to telephone company headquarters and there negotiated with telephone company officials to secure lucrative off-duty jobs.

Ercoli's claim that his false testimony was not material to the grand jury's inquiries must be evaluated against the well-settled test of materiality, that is, "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation." *Carroll* v. *United States*, 16 F.2d 951, 953 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927). This rule governing the standard for materiality in grand jury proceedings was recently reaffirmed in *United States* v. *Doulin*, 538 F.2d 466, 470 (2d Cir. 1976).* This liberal

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* The defendant initially states the materiality standard in terms of the tendency of the testimony to influence, impede or dissuade the grand jury investigation. (Br. at 11). He concludes, however, by citing the stricter standard enunciated in *United States* v. *Freedman*, 445 F.2d 1220, 1226-27 (2d Cir. 1971), "that a truthful answer would have been of sufficient probative importance to the inquiry so that as a minimum, fruitful investi-

[Footnote continued on following page]

test of materiality is necessary to protect the grand jury in the discharge of its historic duty of fully investigating "every clue . . . and all witnesses . . . to find if a crime has been committed, and to charge the proper person with the commission thereof." *Carroll* v. *United States*, *supra*, 16 F.2d at 953; see also *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1969). Examined against this well-established legal standard, it is plain that Ercoli's testimony was material to the grand jury's investigation.

With respect to Count Two, the date when Ercoli was first authorized to receive the $.25 administrative fee was vitally important to an assessment of Ercoli's own culpability in this scheme to defraud the Internal Revenue Service. The police association minute book for January 1972 reflects that approval of Ercoli's administrative fee was directly tied to an increase in the hourly rate of pay to "$5.50 tax free, $6.25 taxed." (GX 3; App. 139). Ercoli's false testimony that his administrative fee had in fact been approved in March, 1971 was an obvious attempt to disassociate his own financial stake in the officers' moonlighting from any illicit scheme to defraud I.R.S. In short, Ercoli sought to "dissuade" the grand jury from believing that he had participated in any plan to defraud the Government.

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gation would have occurred." See also *United States* v. *Birrell*, 470 F.2d 113, 115 n.1 (2d Cir. 1972). The facts in the instant case satisfy either test. We note, nonetheless, that the most recent decision on grand jury perjury, *United States* v. *Doulin*, *supra*, 538 F.2d at 470, enunciates the standard as the "natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation." See also *United States* v. *Albergo*, 539 F.2d 860, 865 (2d Cir. 1976) (dissenting opinion). Chief Judge Kaufman's opinion in *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973), also casts considerable doubt on whether the *Freedman* standard applies to false statements before a grand jury.

Ercoli's false testimony forming the basis for Count Three was similarly material to the grand jury's inquiry. The grand jury inquiry was, in part, designed to determine the extent to which specific police officers and corporate officials participated in a scheme to hire off-duty policemen without requiring these officers to report that income. One of the most lucrative of these tax-free jobs was with the telephone company. The extent and duration of each individual's participation in arranging for the moonlighting job at the telephone company was obviously critical to determining the culpability of that individual and the knowledge he might have about this scheme to defraud the Internal Revenue Service. Ercoli's false testimony that the telephone company officials had come to police headquarters to speak with him was part of a blatant effort to minimize his role in the procurement of the telephone company jobs. He hoped the grand jury would believe that he passively remained at his office and waited for the telephone company officials to approach him about off-duty employment. If the grand jury had credited his false testimony, the investigation might well have shifted its focus away from Ercoli to others less culpable.

In response to all of this, Ercoli seeks to assess the possibility that his answers could have influenceed the grand jury or impeded its investigation with the benefit of hindsight. For example, he argues that the grand jury was aided by his false testimony that the financial incentive was approved in March 1971 and not January 1972, because it increased the time period in which the grand jury examined whether the defendant played an active role in the conspiracy. It is clear, however, that the question of materiality must be viewed from the perspective of the grand jury at the time the witness testified, and not months or years later. See *United States* v. *Stone*, *supra*, 429 F.2d at 140-41; *United States* v.

McFarland, 371 F.2d 701 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967).

Chief Judge Kaufman has written that "[b]ecause of this investigative, rather than adjudicative function, our prior decisions state the test of materiality of grand jury testimony to be whether a truthful answer could conceivably have furthered the inquiry." *United States* v. *Mancuso*, *supra*, 485 F.2d at 281, n.17. Judge Mansfield has recently observed that the test of materialty "is fixed at such a low level that only a minimal amount of proof need be presented to the Court to establish materiality. . . ." *United States* v. *Albergo*, *supra*, 539 F.2d at 865 (dissenting opinion). In view of this broad standard for materiality, and the important interests which the perjury laws protect, Ercoli's position that his testimony could not conceivably have influenced the grand jury inquiry is fanciful. See also *United States* v. *Gugliaro*, 501 F.2d 68, 71 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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COUNTY OF NEW YORK) ss.:

Richard Weinberg being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17 day of January, 1977, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Robert S. Segelbaum, Esq.
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Ossining, New York 10562

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Richard Weinberg

Sworn to before me this
17th day of January 1977

Gloria Calabrese

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